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Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

versus

S. HENDRICKS, JR., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on May 16, 1974.

OPINIONS BELOW

The opinion of the District Court is printed in Appendix A hereto. The opinion of the Circuit Court of Appeals is reported in 495 F. (2d) 289 and is printed in Appendix B hereto. Petitioner's Petition to the Court of Appeals for Rehearing is printed in Appendix C hereto.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

Should this Court issue a writ of certiorari to review the judgment of a Court below where its decision and opinion:

(a) creates a conflict with the decisions of the Courts of other Circuits; and

(b) legislates an amendment to an existing statute, properly within the province of Congress, or promulgates a new rule to govern an area of jurisdiction, properly within the province of this Court.

STATUTES

This petition involves the provisions of 28 U. S. C. 1359.

STATEMENT

Arthur Lee Baker, Jr., his brother, Charles Frederick Baker, and his brother's wife, Virginia Baker, were all killed when the car in which they were riding on Interstate 26 in South Carolina was struck in the rear by a tractor-trailer truck driven by an agent of the Defendant-Respondent S. Hendricks, Jr.

C. G. Bishop, the Administrator of the estates of all three of the deceased instituted suit on behalf of the estate of A. L. Baker, Jr., in the United States District Court for the District of South Carolina. Bishop, the uncle of all three of the deceased is a resident of Georgia; the Defendant-Respondent Hendricks is a resident of South Carolina as are the beneficiaries of the estate involved.

The Defendant-Respondent Hendricks moved to dismiss the suit against it contending that the administrator C. G. Bishop was improperly or collusively made a party Plaintiff so as to invoke diversity jurisdiction of the Federal Courts in contravention of 28 U. S. C., Sec. 1359.

The District Court after conducting an evidentiary hearing found as a fact that the selection of Bishop was

not made so as to manufacture diversity.[1] The District Court Judge nevertheless granted the motion to dismiss deeming his action responsive to certain language of the Fourth Circuit Court in *Miller v. Perry,* 456 F. (2d) 63, to wit:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

But the circumstances and issues brought about by a particular state statute in *Miller* were so especial to that one case and irrelevant to the pivotal issue as it arose in the instant case that petitioner took the position in the District Court that the Fourth Circuit Court's decision in *Miller* must almost necessarily have been intended to apply to *Miller* only.

Petitioner took the same position in his appeal to the Fourth Circuit Court. The Fourth Circuit Court, addressing itself to petitioner's position, formally ratified the scope of its act in *Miller* by declaring:

> "The Appellant would confine the scope of *Miller* to the peculiar facts of that case; and since the facts in this case are different, he argues *Miller,* is without application. *Miller,* however, was not phrased in the narrow terms of its own facts. The language of *Miller* was manifestly intended as a declaration of what one commentator has correctly denominated as **'a substantial change in diversity jurisdiction.'** " [Emphasis supplied.] *Bishop v. Hendricks.*

[1] The evidence of record in support of the finding of the Court was clear and abundant; and no appeal from the District Court's finding was taken by Defendant-Respondent.

The focal point of this petition for a writ of certiorari is the Fourth Circuit Court's making a substantial change in diversity citizenship on its own to the extent of legislating a new statute or promulgating a new rule in the important area of jurisdiction, properly for Congress or this Court.

REASONS FOR GRANTING THE WRIT

1. The Lower Court by its Decision in this Case, Ratifying its Decision in *Miller v. Perry,*[2] has created a conflict between the decisions of Federal Appellate Courts, Which Conflict is Properly for this Court to Resolve.

In handing down its decision in petitioner's case the Fourth Circuit Court firmly announced that its decision and opinion in *Miller v. Perry, supra,* "was manifestly intended as a declaration" of **a substantial change in diversity jurisdiction.**

When the Fourth Circuit Court ordered what was intended to create a substantial change in diversity jurisdiction, as it did and said it intended to do, the Fourth Circuit Court not only usurped the function of another branch of government and went beyond the boundaries of its place in the federal judiciary system, particularly with respect to its subordinate relationship to this Court in rule-making, the Fourth Circuit Court also brought about a conflict between the decisions of Federal Appellate Courts, which conflict is properly for this Court to resolve

Since *Kramer v. Carribean Mills,* 394 U. S. 832 (1969) the Courts of all Circuits, except now the Fourth Circuit Court, have applied the test of whether or not the motivation behind the appointment of an administrator in a death action was for the sole purpose of manufacturing diversity jurisdiction in contravention of the mandate of 28 U. S. C. 1359. This test, logically called for by the express terms of the statute, the prevailing test in all other Circuits, is

[2] *Miller v. Perry,* 456 F. (2d) 63 (4 Cir. 1972).

totally opposed and repudiated by the Fourth Circuit Court's test made "to hinge the diversity determination to the citizenship of the wrongful death action beneficiaries" regardless of the validity of the party's appointment otherwise, as in petitioner's case.

This obvious conflict that now exists between the Circuits in determining the issue of diversity jurisdiction within the mandate of 28 U. S. C. 1359, is a critical conflict in an important area of jurisdiction that needs to be resolved by this Court.

2. The Lower Court Has So Completely Exceeded its Judicial Authority and Function as to Require This Court to Exercise its Power of Supervision to Correct Such Excess.

The "substantial change in diversity jurisdiction" that the Fourth Circuit Court has declared in petitioner's case amounts to ordering an amendment of an existing statute, a function within the province of Congress, if not an act of rule-making, properly for this Court.

Petitioner respectfully submits that the substantial change in diversity jurisdiction thus effected has been improperly wrought into existence to begin with; and, moreover, if allowed to stand, is just the sort of thing that leads to the erosion of due process in this Government.

Manifestly, this is a case calling upon this Court for the exercise of its historic, inherent, and quite necessary power of supervision to maintain reasonable and fair uniformity in the administration of justice between the respective Circuit Courts of the federal judiciary.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari, it is respectfully urged, should be granted.

Respectfully submitted,

/s/ WILLIAM T. JONES,
Counsel for Petitioner.